the buyer enables the latter to mislead the mortgagee.[12] This is merely a judicial crutch, because clearly a lack of knowledge on the part of the seller of the future destination of the property would not affect the result. The rights of the mortgagee do not depend upon the secret state of mind of an unknown seller. The basis of the rule is neither more nor less complicated than a disposition to discourage adverse claims to realty not apparent of record. Why not frankly recognize that it is merely a question of deciding which of two innocent parties has the claim that is socially the more desirable to protect?

The doctrine of the principal case, however, seems inordinately severe on the conditional seller. There should be some method by which he could preserve his title without contravening the spirit of the recording acts. The placing of a name-plate on the property is not adequate, because there is no assurance that it will be seen, and it is impossible to determine under what circumstances, if at all, a third person would be thus charged with constructive notice of the seller's rights.[13] But a record of the contract in such a manner as to describe the land should solve the problem.[14] A rule that would protect a conditional seller of this kind of property who thus records his contract with miscellaneous documents against a later mortgagee of the land commends itself both to business needs and legal justice. By such a rule no unreasonable burden would be placed on the mortgagee, because the universal practice of having an examination made of the title by an abstract company before the loan is advanced would involve a search of the records of miscellaneous instruments as a matter of course.

H. A. B.

MINES AND MINERALS: OIL FLOWING IN STREAMS ABANDONED PROPERTY—A owns land adjoining a watercourse. Waste oil from this land flows down the stream through the land of X and Y. A agrees with B that if the latter will construct and maintain a dam he shall be entitled to the waste oil escaping from A's property and saved by means of the dam. B, with Y's consent, constructs the works on Y's land. In *Duvall et al. v. White et al.*,[1] where B is seeking to restrain X from building a dam for the purpose of diverting the oil, the court says that after the oil is carried beyond A's premises it becomes what may be

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[12] See, besides the principal case, Thomson v. Smith (1900) 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780; and Tibbetts v. Horne, supra, n. 10.

[13] See Hobson v. Gorringe, supra, n. 5.

[14] A note in 16 Harvard Law Review, 531, suggests that the contract be recorded as a mortgage. From the standpoint of the seller, this is satisfactory, but the buyer of the fixtures would be forced thereafter to secure loans on the security of his land at the interest rate prevailing for second mortgages.

[1] (Feb. 25, 1920) 21 Cal. App. Dec. 619, 189 Pac. 324.

designated "abandoned property" and entirely beyond the control of A—that to allow the agreement to be operative would "prevent any intervening landowner from diverting a single drop of water from the stream for any purpose, as any diversion of the water, however small, would deprive the purchaser of the floating oil of a portion of his right."

An abandonment can take place only where the occupant leaves the property free to the appropriation of the next comer, whoever he may be, without an intention to repossess or reclaim it for himself, and regardless and indifferent as to what may become of it in the future. No question of abandonment can arise where a transfer has been had by the act of two parties.[2] At common law, indeed, it was even doubted whether it was possible for a possessor to divest himself of his possession of a thing by willful abandonment of it.[3] In view of the fact that in the principal case we have an attempted transfer for consideration of title to the oil, the designation of the oil as abandoned property may well be questioned.

Is there anything peculiar to the nature of oil to cause A to lose control of it after it leaves his land? It has been pointed out that "water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner."[4] Only when reduced to actual possession do they become the subject of ownership.[5] Should oil escaping from the owner's possession, like captured animals again running wild, be considered nobody's property? So to hold where natural gas escapes from containers into the air would seem proper, due to the impossibility of recapturing it. But oil is easier to control. An owner of logs may float them down a stream to a buyer below,[6] and even stranded logs cannot be appropriated by an intervening riparian owner.[7] Oil will float as readily as logs, and may be impounded by means of a dam. Disposition of water, a thing not dissimilar in nature to oil, offers a closer analogy. If discharged from a ditch, reservoir, or other structure, for convenience in handling it, with the intention of recapturing it at

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[2] Richardson v. McNulty (1864) 24 Cal. 339; Moon v. Rowlins (1868) 36 Cal. 333, 95 Am. Dec. 181; Goodrich v. Mortimer (1919) 30 Cal. App. Dec. 710, 186 Pac. 844.

[3] Pollock and Wright, Possession in the Common Law, 124; 22 Viner's Abridgment, 409.

[4] Ohio Oil Co. v. Indiana (1899) 177 U. S. 190, 205; 44 L. Ed. 729, 20 Sup. Ct. Rep. 576.

[5] Hail v. Reed (1854) 54 Ky. 479; Cal. Civ. Code, § 655; Heyneman v. Blake (1862) 19 Cal. 579; Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 725, 93 Pac. 858, 15 L. R. A. (N. S.) 359, differs from Field, J., in Heyneman v. Blake as to acts necessary so to reduce water to possession that it becomes personal property.

[6] Spokane Mill v. Post (1892) 50 Fed. 429.

[7] Flanders v. Locke (1878) 53 Cal. 21.

some lower point, it is not abandoned.[8] It may even be discharged into a stream as a link in a ditch line and taken out again, though there are prior appropriators or existing riparian owners on the same stream.[9]

Recognition of the continued ownership of the oil, notwithstanding it has left the original owner's actual possession, does not affect the riparian proprietor's right to divert the water on which the oil flows for riparian purposes. The ownership of the oil is clearly subject to the burdens to which its owner allowed it to become subject by placing it in the stream. One of these is that it may be diverted in whole or in part by a riparian proprietor in the exercise of his unquestioned privilege of using the water of the stream. But because it may cease to be his property by the lawful acts of the riparian proprietor is no more a reason for denying it that character until those acts are performed than it is for denying to the householder property in his furniture for the reason that the public authorities may destroy it in preventing the spread of a conflagration, or for denying to a farmer the ownership of his land because a railroad may take it under proceedings in eminent domain. When the court says in the principal case that to allow the agreement validity would prevent riparian proprietors "from diverting a single drop of water" because any diversion "would deprive the purchaser of the floating oil of a portion of his right," it is assuming that ownership necessarily embraces an absolute or unlimited right. Such an absolute right would, as von Ihering points out, result in the dissolution of society. It is hostile to the very notion of society on which property depends. Individual property cannot be defined save in terms of its social side.[10] *R. H. M.*

MORTGAGES: ASSUMPTION OF MORTGAGE DEBT BY GRANTEE OF MORTGAGED PREMISES: NECESSITY FOR EXPRESS PROMISE—Dicta are never desirable. And now, since most of our legal work is done under pressure and at high speed, and the busy practitioner (or his inexpert clerk) is prone to seize upon and quote any clear and succinct statement printed in the reports, a dictum may be dangerously misleading. The treatment accorded an oft-repeated dictum of long standing, in the case of *White v. Schader*[1] illustrates strikingly this danger.

If, upon foreclosure of a mortgage, the sale of the property fails to yield a sum sufficient to pay the mortgage debt, the mort-

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[8] 1 Wiel, Water Rights in the Western States (3d ed.) § 38; Lower Tule etc. Co. v. Angiola etc. Co. (1906) 149 Cal. 496, 86 Pac. 1081; Wutchuma Water Co. v. Pogue (1907) 151 Cal. 105, 111, 91 Pac. 362.

[9] Cal. Civ. Code, § 1413.

[10] Ely, Property and Contract in their Relation to the Distribution of Wealth, I, 137.

[1] (Feb. 10, 1920) 31 Cal. App. Dec. 457. Hearing in Supreme Court granted. Pending.